IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 432 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

SHAW WALLACE &CO. LTD & Others ..... Petitioners

Versus

STATE OF GUJARAT & Another ..... Respondents

Appearance:

MR TS NANAVATI for Petitioners

PUBLIC PROSECUTOR for Respondent No. 1

MR BN KESHWANI for Respondent No. 2

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 29/01/98

ORAL JUDGEMENT

The petitioners (original accused) call in question the legality and validity of the order dated 19.8.1997 passed by the learned Judicial Magistrate (First Class) at Kalol, rejecting the application (Exh.42) filed in Cri.Case No.2382/95 seeking exemption from appearance before the court.

2. The facts which led the petitioners to prefer the present revision application may in brief be stated. The petitioners and opponent no.2 were having business

transactions. In respect of those transactions, the petitioners had to make payments to opponent no.2. Certain cheques were issued in favour of opponent no.2 by the petitioners. One of such cheques was dishonoured and therefore a complaint against the petitioners has been filed in the court of Judicial Magistrate Ist Class, Kalol, which is registered as Cri.C No.:- 2382/95, wherein it alleged that the petitioners committed the offence punishable under Section 138 of the Negotiable Instruments Act. The petitioners who are either the managers or Directors or Jt. Managing Directors of the petitioner no.1, having their business at Calcutta found that it would not be convenient for them to appear before the learned JMFC at Kalol on every date fixed for hearing the case. They therefore filed the application Exh.42 and sought exemption from appearance submitting that their presence before the court was not necessary, their advocate would certainly appear before the court on every date fixed, and would proceed with the case, with the result the progress in the case would never be hampered and their presence might be dispensed with. For several times in past, they had sought the exemption and the learned Magistrate had also granted the same, but hearing the parties, the learned J.M.F.C. at Kalol did not think it just and proper to grant blanket exemption i.e. exemption till the final decision and refused to exercise the discretion in favour of the petitioners. He, hearing the parties rejected the application (Ex 42) filed for seeking permanent exemption. It is against that order, the present revision application is filed.

3. The Learned Advocate representing the petitioners has contended that ordinarily the Criminal court without being touchy must grant the exemption, unless ofcourse the presence of the accused before the court is found imperative for good reason. No doubt, the trial is required to be conducted in the presence and hearing of the accused, but to refuse the exemption to the accused from personal appearance on that count would tantamount to using that principle as an instrument of oppression. The accused has a right to insist and demand to conduct the trial in his presence. It is open to the accused to waive that right, and claim exemption as of right, of course in that case he will have to face the consequences that follow without raising any objections. In law the prosecution does not have a right to object when advocate is to appear & proceed with the case. In support of his such submission he drew my attention to the decision of this court rendered in the case of Jayantilal Chhaganlal Vs. Panchal & Others AIR, 1986 GLH 166. Mr.Keshwani, the learned advocate for respondent no.2 has advancing

sanguineous arguments supported the order. According to him the Court in law is not helpless, it has the power to frustrate the strategy of the accused, or his plan to subjugate the prosecution and administration of Justice by any logic. He has also submitted that the scope of inquiry in Revision is limited. The Court will be slow to upset the order when it is neither illegal nor unjust. Further the impugned order being interlocutory this Revision is incompetent. The learned A.P.P. has supported the order in question.

4. About competency of the Revision, Sec.397 (2) Cr. P. Code being relevant provision has to be borne in mind. It lays down that if the order is interlocutory order, Revision is not maintainable. Whether the order in question can be termed "interlocutory order" is the point in controversy as both have submitted diametrically opposed to the other side.

5. The expression 'inter-locutory order' is not defined in the Criminal Procedure Code. Considering the object of the provision, the most apt, appropriate, and proper meaning that can be spelt out is that the order which is purely interim, or of a temporary nature which does not adjudicate or touch the important rights and liabilities of the parties can be termed inter locutory order. In other words, the order which does not determine the rights and obligations of the parties finally can be described as the inter locutory order. However, it may be stated that intermediate or quasi-final order which determines a particular issue finally at any stage of the hearing will not fall within the ambits of interlocutory order.

6. When order granting or refusing to grant exemption from personal appearance is passed, important rights & liabilities of the parties can not be said to have been determined or touched. Such order is purely the procedural one having no impact on the rights & obligation of any of the parties on any of the issues that arises for consideration. Such order is therefore interlocutory order. It may be stated at this stage that the Kerala High Court in the case of N Dinesan Vs. K.V.Baby 1981 Criminal Law Journal 1551 has, placing reliance on the decision of the Apex Court in Madhu Limaye Vs. State of Maharashtra 1978 Cr. L.J. 165, made it clear that if the personal attendance of the accused is not dispensed with and order rejecting the application is passed, Revision against such order is not competent because the said order would be the interlocutory order within the meaning of Section 397 (2)

of the Cr.P.Code. This revision is therefore not competent.

7. In the above case of N.Dinesan High Court of Kerala has held that the High Court, if Revision is not competent, may exercise inherent powers under Section 482 of Cri.P.Code. To prevent miscarriage of Justice or securing the ends of Justice, or where the order passed patently illegal, or perverse, or irregular, or mandatory requirements are set at naught, or where for immediate redressal so as to correct the manifest injustice apparrent on the face of record is necessary, there is no limitation in the exercise of inherent powers u/s 482 Cr.P.Code eventhough the order under challenge is inter-locutory order. Let me however say that such exercise of powers u/s 482 must be thrifty and chary, or with restraint, and not ordinarily as a matter of course. As urged whether this is a fit case wherein the powers u/s 482 are required to be exercised is the question now to be examined.

8. Before the question is examined on merits, a look at the provisions of the law applicable and certain decisions, is necessary. The general principle of the Cri. P. Code is that the accused cannot be proceeded against ex-parte. Sec. 205 of the Cri. P.Code 1973 relates to dispensation with personal attendance of accused by a magistrate. Sec. 273 of that Code provides that the evidence has to be taken in the presence of accused, while Sec.317 of that Code is qua the provision for inuiries and trials being held in the absence of accused in certain case. Sec.205 of the Code provides an exception to such general rule. The Magistrate may so far as his own Court is concerned dispense with the personal attendance of the accused in a particular case as often as he pleases, and if accused's presence is found necessary at any stage the Magistrate can direct him to appear in person, even after exemption is granted. The power to exempt is discretionary and has to be exercised judicially, and not arbitrarily. Sec.205 of the Cri. P. Code applies to Magistrate and not to the Courts of Sessions or High Court; but the High Court may exercise its power u/s 482 of the Cri. P. Code 1973.

9. Sec. 273 of the Code provides that all evidence should be taken in the presence of the accused or in certain circumstances in the presence of his pleader. But this section by necessary implication confers power on the court to dispense with personal attendance of the accused. The provision being imperative, contravention thereof will not be a mere error, ommission or

irregularity and cannot be cured and will affect the legality of the trial if presence of accused is not dispensed with.

10. Sec. 317 of the Code cannot be overlooked. Under that provision the Court has power to dispense with personal attendance of the accused and permit him to be representated through a lawyer in the interest of justice and for expeditious disposal of a case; but the power has to be exercised judicially and not capriciously considering the circumstances of the case. The scope of this provision has been extended to enable the proceedings to be conducted in the absence of an accused persistently disturbing the proceedings.

11. With regards to a grant of exemption to the accused from personal appearance is concerned, in the cases of Jayantkumar Chotabhai Patel Vs. Shreyans Shantilal Shat & Othrs 1995 (2) GLH (UJ) 7 and in the case of Chandu Lal Chandraker Vs. Puran Mal and another AIR, 1988 SC 2163 what is made clear is that the court should be liberal in the exercise of such powers. The order should not be such which will operate as an engine of oppression. In the case of Chandulal Chandrasekhar (Supra) the Supreme Court went a step further saying that even at the time of recording the statement of the accused under Section 313 of the Cr.P.Code the presence of the accused can be dispensed with, if the accused through his advocate submits to the court and makes it clear that he does not want to answer any of the questions put to him by the court and would not raise a question of prejudice at any stage. When the law is accordingly made clear by the pronouncements of the Apex court and this court, qua the above stated provisions, the approach of the court should be liberal while exercising it's discretionary powers so as to determine whether presence of the accused should be dispensed with? Ordinarily, therefore the criminal court should liberally lean to the exercise of powers in favour of the accused and grant exemption on medical ground or on the just cause being shown regardless of his status or position, unless ofcourse the presence of the accused is found imperative for one or another good cause because the right to claim exemption is not unfettered. It may be mentioned that if accused is obstrerous and hampers the conduct of trial exemption may be granted. In case of disabled or old accused or woman accused lenient view can be taken. Nevertheless it is fallacious to believe that the decision in the case of Jayantilal Chhaganlal (Supra) lays down that the accused is having unfettered right and the court has no option but to grant the exemption as and

when prayed for. When plea is to be recorded and the court considers the presence of the accused before it necessary, or the question of identification is raised, or likely to arise, or the statement of the accused under Section 313 Cri.P.Code is to be recorded and accused has not made it clear that he will not raise any question about the prejudice or deprivation of the opportunity to explain, or where progress in the matter is likely to be obstructed, or accused's advocate is not to appear, or it is not certain that his advocate will appear to proceed with the hearing and to the satisfaction of the court assurance is not given to the fact that in case his advocate will not appear he shall without resorting to any excuse or pretext appear & proceed with the hearing, or it appears to the court that the accused seeking exemption wants to delay the final decision, or wants to frustrate the case of the prosecution, or is going to prejudice the case of the prosecution seeking exemption, or is playing a foul game, or there is a reason to believe that owing to the absence of the accused further progress in the matter is likely to be obstructed, or there is possibility of accused's absconding, or there is vengeance or mischief in the back ground, or the cause assigned is not appealing, or the case is of a serious nature and not petty trivial and/or technical, or the case is not punishable with fine only, or exemption is claimed only on the ground of a distance but no uncommon hardships in attending court is stated, or by special provision in the Act applicable, exemption is not permitted, it is open to the court to refuse to grant exemption from personal appearances. In case personal appearance is not dispensed with, reasons thereof should be recorded.

12. Right from inception as submitted before me, the learned Magistrate went on granting exemption and never directed the petitioners to appear before him in person, but it appears when impunged order is passed the learned Magistrate wanted to record the plea of the petitioners, and so to have their presence before him, he in his discretion refused to grant exemption from appearance. There is nothing on record that the discretion exercised is unjust, or capricious, or arbitrary, or perverse. The learned advocate for the petitioners also is not able to point out that the discretion is exercised unjustly or capriciously or arbitrarily or perversely. Simply because the order is not palatable to the petitioner, the same cannot be upset. It cannot also be interefered with on the ground of the right of the accused because the right is not absolute or unfettered. It is subject to above stated factors. The Order therefore cannot be held

bad and struck down. Further the day on which the petitioners were directed to appear has already passed away. There is therefore no reason to interfere with the exercise of discretion by the learned Magistrate, exercising inherent powers of this Court.

13. What is also prayed for is that petitioners may be granted exemption till the final decision i.e. for the entire duration of the trial unless something during the course of hearing develops making their presence necessary before the court. Ofcourse it is open to the court to pass such a blanket order, but ordinarily court will be slow to pass such order because one would not know at what juncture how the things would develop in future and what exigencies will have to be met with, for one cannot forsee everyting. Owing to sudden absence of the advocate, or emergence of some issue during the course of hearing, necessitating its solution at the spot, the presence of the accused at that particular stage will be found imperative and the court would be helpless if the accused is not present in the Court. Hence the court has to exercise discretion considering the then prevailing circumstances, and whatever the court can at that stage reasonably foresee. In this case if the prayer for exemption is granted till final decision in the matter, the Learned Magistrate who has to conduct the trial of the case may at times feel difficult to meet with odd or bizarre situations that may arise which none might have thought of, and in that case the parties will have to move this court for appropriate order or for necessary modification in the order as the Learned Magistrate in that case will have no way out. With a view to circumvent this situation and not to put the lower court into embarrassing position, it would be better if the question is kept open so that the learned Magistrate can, as and when prayer for exemption is made, pass appropriate order considering the facts & circumstances of the case and rival contentions. In view of the matter, I do not see any justification to exercise my inherent power and interfere with the order already passed.

14. For the aforesaid reasons, this Revision Application is hereby dismissed, making it clear that in future it will be open to the petitioner to pray before the trial Court for exemption for necessary period, and the Learned Judicial Magistrate will pass appropriate order considering the submissions of the parties and circumstances on record. Notice discharged. Interim relief if any stands vacated.

jitu